

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 387 of 1989

with

CRIMINAL APPEAL No 544 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL

and

MR.JUSTICE M.H.KADRI

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

Criminal Appeal No. 387 of 1989:

Ram Snehi Budhva

Versus

State of Gujarat

Criminal Appeal No.544 of 1989:

Jaishanker Shivmuratsinh

Vs.

State of Gujarat.

Appearance:

1. Criminal Appeal No. 387 of 1989

MR PM VYAS for the appellant.(Appointed)

Mr. M.A.Bukhari, A.P.P. for the respondent.

2. Criminal AppealNo 544 of 1989

MR PM VYAS for the appellant.(Appointed)
Mr. M.A.Bukhari,A.P.P. for the respondent.

CORAM : MR.JUSTICE J.M.PANCHAL and
MR.JUSTICE M.H.KADRI

Date of decision: 29/08/96

ORAL JUDGEMENT: (J.M.Panchal,J.):-

Criminal Appeal no.387/89 is filed by Ram Snehi Budhva, who was original accused no.3 in Sessions Case no.19/87; whereas Criminal Apopeal no.544/89 is filed by Jaishanker Shivmuratsinh,who was original accused no.4 in Sessions Case no.19/87. In both these appeals, respective appellants have challenged judgment and order dated June 17,1989 delivered by the learned Additional Sessions Judge, Surat, in Sessions Case no.19/87 convicting them under sections 449, 460, 302 & 114 of the Indian Penal Code and sentencing them to R.I.for life. It may be mentioned that no separate sentences have been imposed on the appellants under sections 449, 460 of I.P.C. As both these appeals are directed against common judgment and order rendered by the learned Additional Sessions Judge, Surat in Sessions Case no.19/87, we propose to dispose of them by this common judgment.

2. In brief the prosecution case is that complainant Amarchand Laherulal was serving in the shop of Devilal Shankerlal, which was situated near Sachin Police Station, Sachin. The shop was being opened in the morning at about 6.00 A.M. and used to be closed by 7.30 P.M. Name of wife of Devilal was Pushpaben. The incident took place on October 26,1986 at about 8.00 P.M. At the time when the incident took place, Devilal had gone to village Bhestan for business purpose,whereas witnesses Ambalal, Shivilal, Amarchand etc. were taking dinner in the kitchen of Devilal which was being served by Pushpaben. Shivilal had alread completed his dinner and gone for the purpose of drinking water. Meanwhile, from the front door of the house three persons entered the kitchen and one of them signed Amarchand Laherulal to keep mum. On noticing presence of unknown persons in kitchen, deceased Pushpaben asked intruders as to what they wanted. The unknown intruders had weapons with them. Therefore, Ambalal and Shivilal got frightened and ran outside. Amarchand Laherulal, who was taking dinner, got up, but,one of the intruders rushed towards him,

whereas two others rushed towards Pushpaben and pushed her. Because of this, Amarchand Laherulal also got frightened and ran towards another room, but stopped near its entrance. One of the two persons, who had pushed Pushpaben, had Tamancha with him; whereas another had knife with him. According to Amarchand, 3rd intruder, who had rushed towards him, had also knife in his hand. One, out of two intruders, who had pushed Pushpaben, tried to inflict blow on her with knife as a result of which, Pushpaben was scared. The another intruder, who had Tamancha with him, fired shots from Tamancha and because of this Pushpaben received bullet injuries on her jaws. Due to the injuries sustained by her, Pushpaben fell down and thereafter the unknown intruders made their escape good from the front door. Thereafter Amarchand Laherulal raised shouts. On hearing the shouts, Ambalal, Shivilal and others collected near the place of occurrence. As the Police Station was nearby, Amarchand Laherulal went to the Police Station and lodged First Information Report about commission of cognizable offences. Prahladbhai Jayram Patil, who was incharge of Sachin Police Station, recorded the information given by Amarchand and entered the same in the register kept at the Police Station. The intruders were not known to the complainant. The complainant, therefore, gave description of the intruders in the complaint. In the complaint the complainant stated that the intruder who had fired Tamancha, was black and sporting mustache. It was also mentioned that he was wearing light red coloured Jersey and white dirty pants. The complainant further mentioned in the complaint that another intruder had put on black shirt and dirty white pants. After registering the complaint, P.S.I. Mr. Patil commenced investigation. He held inquest on the dead body of deceased Pushpaben and conveyed necessary information to his higher officer. On October 27, 1986, P.S.I. Mr. Patil prepared panchnama of place of occurrence in presence of independent witnesses and also recorded statements of witnesses conversant with the facts of the case. Thereafter, further investigation was handed over to Manoj Dineshkumar Antani, who was then discharging duties as S.P., Surat (west). S.P. Mr. Antani recorded statements of Devilal Shankerlal, Shivilal Gopilal, Fatehlal Madanlal etc. He also recorded statements of relatives of the deceased. He arrested accused Ramsumer @ Ramnivas and Kalluprasad Bindeshwari on October 31, 1986 and prepared panchnama of persons of accused in presence of witnesses. On November 1, 1986, S.P. Mr. Antani continued to interrogate accused who were arrested. Pursuant to the information received from the arrested accused, accused Ram Snehi, who is appellant in Criminal

Appeal no. 387/89 was arrested and search of the room in which he was residing resulted into discovery of Tamancha as well as cartridges, which were seized under panchnama. Accused Jaishankersinh, who is appellant in Criminal Appeal no.544/89, was also arrested in due course and at his instance knife used by accused Ramsumer was discovered. Pursuant to the information given by accused Jaishankersinh, S.P. Mr. Antani discovered knife used by him in presence of panch witnesses. By November 8, 1986 all the accused were arrested and produced before the competent Court. Though S.P. Mr. Antani has not stated anything in his evidence, it is revealed from the evidence of Jayantibhai Chaturbhai Patel, Executive Magistrate that he had received Yadi from S.P. requesting him to hold identification parade, as the accused were not known to the witnesses, but had asserted that they were able to identify them. Identification parade was held on December 16, 1986 wherein it is alleged that complainant Amarchand Laherulal and witness Ambalal Shankerlal identified both the appellants. The medical officer, who performed autopsy on the dead body, reported that the cause of death was shock and haemorrhage as a result of gun shot (fire arm) injuries. At the conclusion of investigation, it was revealed that Devilal, owner of the shop had quarrel with the appellant of Criminal Appeal no.387/89, as the said appellant had beaten son of Devilal 15 days prior to the date of the incident and this was the motive for crime. The investigating officer chargesheeted the accused under sections 452, 302, 34, 114 of the Indian Penal Code and Section 25 of the Arms Act, 1959. As the offence under section 302 of I.P.C. is exclusively triable by a Sessions Court, the case was committed to Sessions Court for trial and numbered as Sessions Case No.19/87.

3. The learned Additional Sessions Judge, Surat framed charge against the accused at Exh.4 under sections 449, 460, 302 in the alternative under sections 302, 114 of the Indian Penal Code. The charge was read over and explained to the accused. The accused did not plead guilty to the charge and claimed to be tried. The prosecution, therefore, examined following witnesses to prove its case against the accused :-

- (1) Shivrul Bhopuji, PW.1, Exh.12
- (2) Dr. Harendrasinh Bhulabhai Parmar, PW.2, Exh.13
- (3) Ambalal Shankerlal, PW.3, Exh.21
- (4) Devilal Shankerlal, P.W.4, Exh.22
- (5) Amarchand Laherulal, P.W.5, Exh.24
- (6) Ravsaheb Maharuk Mamane, PW.6, Exh.26
- (7) Sudhalkar Raghunath, PW.7, Exh.28

- (8) Mohmadajgar Abdulkarim, PW.8, Ex.30
- (9) Vasant Omkar, PW.9, Exh.32
- (10) Samsuddin Sarfuddin Shaikh, PW.10, Ex.33
- (11) Iftekhar Ahmad Rasulbhai Malek, PW.11,Ex.36
- (12) Manharbhai Fulchandbhai, PW.12, Ex.37
- (13) Ranjitsinh Jaysinh Vansiya, PW.13, Ex.40
- (14) Nathubhai Makanbhai Surati. PW.14, Ex.43
- (15) Narendrakumar Chhedilal, PW.15, Ex.44
- (16) Jayantibhai Chaturbhai Patel, PW.16,Ex.46
- (17) Rajendra Rampati Tiwari, PW.17, Ex.49
- (18) Jahangir Babubhai Saiyad, PW.18, Ex.50
- (19) Prahlad Jayram Patil, PW.19, Ex.57
- (20) Manoj Dineshkumar Antani, PW.20, Ex.58

The prosecution also relied on documentary evidence, such as postmortem notes prepared by Dr. Parmar and produced at Exh.18, inquest report, exh.23, complaint filed by Amarchand which was produced at exh.25, arrest panchnama of the accused, discovery panchnama, panchnama of scene of offence produced at exh.35, panchnama regarding identification parade which was produced at exh.47, report of the analyst exh.60 etc. to prove its case against the accused.

4. After recording of evidence of prosecution witnesses was over, the learned Judge questioned the accused generally on the case and recorded their statements under section 313 of the Code of Criminal Procedure,1973. In their statements under section 313 of the Code, the accused stated that case of the prosecution against them was false. However, none of the accused led any evidence in his defence.

5. The learned Judge, after considering the evidence led by the prosecution and hearing the parties, recorded following conclusions:-

- (1) The evidence of eye witness Amarchand and the evidence of Dr. Harendrasinh Parmar read with the contents of postmortem notes exh.18 establish beyond reasonable doubt that Pushpaben died a homicidal death.
- (2) Sworn testimony of witness Shivilal Bhopuji is of no help to the prosecution, as he could not identify any of the intruders who had entered the house.
- (3) Evidence of Ambalal Shankerlal is trustworthy and reliable which establishes that he had correctly identified accused nos.3 & 4 at the identification parade and also in the Court. His evidence further proves that accused no.4 had

tried to inflict blow with knife on the deceased Pushpaben, whereas accused no.3 had caused gun shot injuries to deceased Pushpaben by firing Tamancha.

- (4) Evidence of Amarchand Laherulal is also credit worthy and he had also correctly identified accused nos.3 & 4 not only at the identification parade, but also in the court. His evidence proves beyond reasonable doubt that accused no.4 had tried to inflict blow with knife on the deceased Pushpaben. whereas accused no.3 had fired shots from the Tamancha and caused gun shot injuries to deceased Pushpaben.
- (5) Evidence of Executive Magistrate Jayantibhai Chaturbhai Patel read with evidence of panch witness Rajendra Rampati Tiwari proves it beyond reasonable doubt that on December 16,1986 identification parade was held by Executive Magistrate and complainant Amarchand as well as witness Ambalal Shankerlal had correctly identified accused nos.3 & 4 as persons who had intruded in the house of Devilal on the date of the incident.
- (6) The discovery made by the investigating officer pursuant to the information received from accused is reliable and it connects accused nos.3 & 4 with the offences mentioned in the charge.
- (7) The medical evidence corroborates testimony of witnesses, who had correctly identified accused nos.3 & 4.
- (8) Accused nos.3 & 4 committed house trespass in order to commit offence under section 302 of I.P.C. which is punishable with death and, therefore, are guilty under section 449 of I.P.C.
- (9) Accused nos.3 & 4 at the time of committing lurking house trespass by night caused death of Pushpaten jointly and, therefore, are guilty under section 460 of I.P.C.
- (10) Accused nos.3 & 4 are guilty under section 302 read with section 114 of I.P.C.

In view of the above referred to conclusions, learned Judge convicted the present appellants under sections 449, 460, 302, 114 of the Indian Penal Code and imposed sentence on them, which is referred to earlier, giving rise to the present two appeals.

6. Mr. P.M.Vyas, learned Counsel appearing for the appellants in both these appeals has taken us through the entire evidence on record. Learned Counsel for the appellants has strenuously urged that as the prosecution

has failed to establish identity of the appellants as perpetrators of crime, the appeals should be allowed. Elaborating the said contention it was argued that though all the accused were arrested by November 8, 1986, identification parade was held by the Executive Magistrate on December 16, 1986 and as prosecution has offered no explanation for delay caused in holding identification parade, evidence relating to the same deserves to be discarded. It was emphasised that witness Ambalal Shankerlal has stated in his evidence that he was asked to participate in the identification parade on December 12, 1986; whereas the evidence of S.P. Mr. Antani indicates that he had received copy of panchnama of identification parade on December 13, 1986, which makes it doubtful whether in fact any identification parade was held on December 16, 1986 and, therefore, the learned Judge committed material error in placing reliance on the evidence pertaining to identification of the appellants by complainant Amarchand and witness Ambalal. The learned Counsel for the appellants asserted that none of the intruders was previously known to the prosecution witnesses and, therefore, identification of the appellants by complainant Amarchand and witness Ambalal in Court after a period of more than two years should not have been relied on by the learned Judge. It was asserted on behalf of the appellants that identity of the present appellants is not established at all by the prosecution and, therefore, the appeals should be accepted and the appellants should be acquitted.

7. Mr. M.A. Bukhari, learned A.P.P. submitted that in the complaint the complainant has given description of the appellants and had identified them correctly in identification parade and, therefore, involvement of the appellants as perpetrators of crime is established beyond reasonable doubt. The learned Counsel for the State Government emphasised that from the evidence on record it is established that the witnesses were not available in Sachin Town for a pretty long time, as a result of which, identification parade could not be held immediately after arrest of the accused and, therefore, the learned Judge cannot be said to have committed any error in placing reliance on the evidence of identification of the appellants by complainant Amarchand and witness Ambalal. In the alternative, it was argued that identification of the present appellants in Court by complainant Amarchand and witness Ambalal inspires confidence and no benefit of doubt should be given to the appellants on the ground that their identification is not established by prosecution. Mr. Bukhari, learned A.P.P. emphasised that circumstantial

evidence, such as - discovery of weapons pursuant to the information given by the accused, report of Assistant Director, Forensic Science Laboratory, Gujarat State, Ahmedabad also corroborates the sworn testimony of the witnesses and, therefore, the conviction recorded and sentence imposed on the appellants should be upheld by the Court.

8. The fact that Pushpaben died a homicidal death is not challenged on behalf of the appellants in these appeals. That fact is fully established from the evidence of eye witness Amarchand read with evidence of Dr. Parmar, who performed autopsy on the dead body of Pushpaben and the contents of postmortem notes exh.18. In the postmortem notes, cause of death of Pushpaben is mentioned to be shock and haemorrhage as a result of gun shot (fire arm) injuries. Under the circumstances, the finding recorded by the learned Judge to the effect that Pushpaben died homicidal death being just and proper, is hereby upheld.

9. In view of the rival submissions made at the Bar the question which has to be determined by the Court is whether identity of the appellants as assailants of deceased Pushpaben is established beyond reasonable doubt. The evidence of Shivilal Bhopuji, PW.1, exh.12 does not help the prosecution in establishing the identity of the appellants at all. In his evidence, he has stated that one of the three intruders had pistol in his hand, whereas others were armed with knives and as he was frightened, he had run away from the house. In his examination-in-chief this witness has clearly stated that he was not able to see the intruders properly and, therefore, was not in a position to identify any of them. He has also admitted that he was not able to identify any one as intruder at the identification parade which was held on December 16, 1986. The evidence of Executive Magistrate Mr. Patel read with contents of Panchnama of identification parade also makes it abundantly clear that this witness was not able to identify any of the accused. Under the circumstances, the finding recorded by the learned Judge that sworn testimony of Shivilal Bhopuji does not establish identity of any accused as perpetrators of crime, is well-founded and is confirmed.

10. Ambalal Shankerlal, PW.3, Exh.21 has narrated in detail as to how the incident took place and shots were fired at the deceased by the accused. He has claimed that at the identification parade he had identified accused no.3 as person who had Tamancha with him as well as accused no.4 who had knife with him. He also

identified accused nos.3 & 4 in Court room and stated that accused no.3 had Tamancha with him at the time of incident, whereas accused no.4 had open knife. In his evidence before the Court, the witness asserted that accused no.3 had put on red jersey and white pants and the 3rd person who had also knife with him, was wearing black shirt and dirty pants. In Para-9 of his deposition, the witness has stated that he was not sure whether accused no.3 was wearing same jersey which was shown to him as one of the muddamal articles. He also mentioned that identical Tamancha which was shown to him during his deposition, was in the hand of accused no.3. The witness has admitted in para-10 of his deposition that his employer Devilal had a quarrel with unknown persons 15 days prior to the date of incident in connection with affairs of his son. In para-21 of his deposition, the witness has clearly stated that at the time when the identification was held, police personnel belonging to Sachin Police Station were present in the fort. In that very para he has also stated that for the first time he was summoned for participating in identification parade on December 12,1986 and as the Executive Magistrate was not available, he was again summoned on December 16,1986. Similarly, Amarchand Laherulal, PW.5, Exh.24 has also elaborately mentioned as to how the incident took place and deceased was assaulted. He has asserted in his testimony before Court that he had identified accused no.3 as person who had fired shots from Tamancha at deceased Pushpaben and accused no.4 as person who had tried to cause injuries to deceased Pushpaben by means of knife at the identification parade held on 16.12.1986. This witness has also identified accused nos.3 & 4 in the Court. In para-13 of his deposition, the witness has stated that on October 28,1986 he along with others had gone to the native place situated in Rajasthan State for the purpose of performing obsequies of deceased Pushpaben and had returned to village Sachin on October 31,1986. He has further elaborated that he had come back to village Sachin on October 31,1986, as he was supposed to open the shop, but as he was frightened, he had again gone to his native village on October 31,1986 and returned to village Sachin 10 to 15 days thereafter. He has denied the suggestion that on seeing three unknown intruders, he had run away from the house. A bare glance at the complaint filed by this witness makes it abundantly clear that the persons who had entered the house of Devilal, were unknown to him and, therefore, he had given faint description of their appearance and clothes worn by them. The evidence of Jayantibhai Chaturbhai Patel, PW.16, Exh.46 shows that at the relevant time he was discharging

duties as Additional Executive Magistrate, Surat and had received yadi exh.47 from S.P. Surat (west) requesting him to hold identification parade. This witness has stated that initially it was decided to hold test identification parade on December 10,1986, but as he was busy with attending a meeting, holding of identificaiton parade was postponed to December 20,1986 and necessary intimation was sent to all concerned including Court. The Executive Magistrate has claimed that though it was decided to hold identification parade on December 20,1986, the date was advanced to December 16,1986 at the request of the investigating officer. He has further clarified that in fact holding of identification parade was not postponed to December 20,1986, but was postponed to December 19,1986 and the date of December 20,1986 was mentioned by him by mistake. The witness has elaborately described the steps and pre-cautions taken by him while holding identification parade on December 16,1986 and asserted before the Court that complainant Amarchand and witness Ambalal Shankerlal had correctly identified accused nos.3 and 4 at the identification parade. The testimony of Rajendra Rampati Tiwari, PW.17, Exh.49 shows that at the instance of Additional Executive Magistrate he had acted as panch witness at the time when test identification parade was held and in his presence complainant Amarchand and witness Ambalal had identified accused nos.3 & 4 as two out of three intruders, who had entered the house of Devilal. In view of this evidence led by the prosecution, the question has to be determined as to whether the evidence led by the prosecution regarding identity of the present appellants as perpetrators of crime, is established beyond shadow of doubt.

11. Before deciding the question referred to hereinabove, it would be advantageous to notice law relating to test identification parade. The object of the identification parade of accused persons is to test the varacity of eye witnesses when they have a genuine claim to have seen the culprit and to assure reliability of the witnesses who pass the test. The identification test is usually adopted during the investigation of crime by the police when the witnesses are interrogated and state that they had seen some persons committing the crime, but do not know their names and would be able to identify them. The identification parade is held during investigation only and that too at the instance of investigation agency, to satisfy itself whether the particular suspect participated in the crime or not by putting him up before the witnesses who claim to have been present at the time the crime was committed. The

conduct of an identification parade belongs to the realm and is part of the investigation. The evidence of test identification parade is admissible under section 9 of the Evidence Act. Since the human memory is apt to get dulled with the passage of time, it is desirable both in the interest of the honest witness and of the suspect himself that the latter be put up for identification without delay. Delay mars its sanctity. The value of the test identification apart altogether from the other safeguards appropriate to a fair test of identification depends on the promptitude in point of time with which the suspected persons are put up for test identification. If there is unexplained and unreasonable delay in putting up the accused persons for a test identification, the delay by itself detracts from the credibility of the test. The evidence of identification merely corroborates and strengthens the oral testimony in Court which alone is the primary and substantive evidence as to identity. The purpose of test identification is to test that evidence, the safe rule being that the sworn testimony of the witness in Court as to the identity of the accused who is a stranger to him, as a general rule, requires corroboration in the form of an earlier identification proceeding. It is no doubt true that absence of corroboration by test identification may not assume any materiality if either the witness had known the accused earlier or where the reasons for gaining an enduring impress of the identity on the mind and memory of the witness are, otherwise, brought out. However, when the accused person is not previously known to the witness concerned, then identification of the accused by the witness soon after the former's arrest is of vital importance because it furnishes to the investigating agency an assurance that the investigation is proceeding on right lines in addition to furnishing corroboration to the evidence to be given by the witness later in Court at the trial.

In the light of these principles, the question posed in the Appeals will have to be considered. As noticed earlier, identification test is usually adopted during the investigation of crime only and that too at the instance of investigation agency. In this case, S.P. Mr. Antani in his sworn testimony before Court has not referred to any requisition having been made by him to the Executive Magistrate for the purpose of holding identification parade. To say the least, he has given evidence on oath in most cursory and casual manner. He has not stated in his evidence that Executive Magistrate had decided to hold identification parade on December 10, 1986, but was postponed to December 19, 1986 and

intimation of the same was received by him from the Executive Magistrate. The Executive Magistrate has claimed that the date of holding test identification parade was advanced at the instance of investigating officer, but, this witness has not stated at all that at his instance identification parade was held on December 16,1986 though it was postponed to December 19,1986. In his examination-in-chief, the witness has, in no uncertain terms stated on oath before Court that he had received copy of pachnama of identification parade on December 13,1986. This statement on oath itself makes it doubtful as to whether identification parade was held on 16.12.1986 as claimed by the Executive Magistrate. From the evidence led by the prosecution there is no manner of doubt that by November 8,1986 all the accused were arrested. Mr. Antani in his deposition has not offered any explanation as to why exh.47 was addressed by him to the Executive Magistrate on November 19,1986 and not earlier. Delay between the arrest of the accused and sending of Yadi requesting the Executive Magistrate to hold identification parade could have been explained only by the investigating officer, but, unfortunately, not a word is stated by the investigating officer to explain this delay. Therefore, we hold that delay between the date of arrest and sending of Yadi to the Executive Magistrate is not explained by the prosecution at all.

12. S.P. Mr. Antani has not referred to yadi Exh.47 at all. We have our own doubts as to whether yadi exh.47 could have been admitted in evidence when it is not proved by Mr.Antani as required by the provisions of the Evidence Act. Strictly speaking, the same could not have been received in evidence, more particularly when the Executive Magistrate does not claim in his evidence that he was conversant with writings of Mr. Antani and exh.47 was signed by Mr. Antani. Even if it is assumed that it is admissible in evidence, it is not a substantive piece of evidence, but can be used only as corroborative piece of evidence. We have gone through Exh.47 minutely. In that yadi, a request was made to the Executive Magistrate to hold identification parade after intimation to the witnesses, as witnesses were not available. This statement made in exh.47 deserves to be scrutinised closely. Witness Ambalal Shankerlal has stated that on October 28,1986 he with Shivrulal, Devilal, Amarchand etc. had gone to the native place for performing obsequial ceremonies of deceased Pushpaben and he in the company of Shivrulal and Amarchand had returned to village Sachin on 31.10.1986, whereas Devilal had returned to village Sachin 15 days thereafter. This is so stated by him in para-26 of his deposition. Devilal, whose wife met with

unfortunate death, has stated in his evidence that obsequies of his wife were performed in his native village Kagni situated in Rajasthan State and he had left Sachin for village Kagni on October 28,1986 in company of others. The witness has further asserted that he had returned to village Sachin after about 20 days; whereas Ambalal Shankerlal,Amarchand Laherulal and Ganpat had returned to village Sachin 10-12 days after going to village Kangi. Amarchand Laherulal has claimed in para-13 of his deposition that he had left village Sachin for native place of Devilal together with, Ambalal, Shivilal, Devilal, Ganpat etc. to perform obsequial ceremonies of deceased Pushpaben and had come back to village Sachin on October 31,1986, as he was supposed to open the shop owned by Devilal. The witness has asserted that as he was frightened, he had not opened the shop on October 31,1986, but had gone back to native place on that very day and had returned again to village Sachin 10-15 days thereafter. A reasonable reading of the evidence of prosecution witnesses makes it clear beyond doubt that all the witnesses were back in village Sachin by November 15,1986. Under the circumstances, the statement made in yadi exh.47 to the effect that witnesses were not available till the date of yadi,is incorrect and doubtful. Delay between receipt of yadi for holding identification parade and actual holding of identification can be explained only by the Executive Magistrate. We have carefully perused exh.47 which is the yadi produced by the Executive Magistrate. From the endorsement made thereon it is evident that on receipt of yadi, Executive Magistrate fixed December 10,1986 as the date for holding identification parade. The Executive Magistrate has not offered any explanation as to why in the first instance itself it was decided to hold identification parade on December 10,1986. The evidence of Executive Magistrate further indicates that as he had to attend meeting on December 10,1986, holding of identification parade was postponed to December 19,1986. However, neither his evidence nor the evidence of investigating officer throws any light as to whether accused were brought from judicial custody to Fort premises where the parade was to be held on December 10,1986 or not. As observed earlier, the accused were arrested by November 8,1986. They must have been thereafter produced before learned Magistrate at the regular interval of 15 days as required by section 167 of the Code of Criminal Procedure,1973. The accused have not made any grievance that the investigating officer committed breach of provisions of section 167 of the Code and they were not produced before the learned Magistrate at regular interval as required by law.The presumption

under section 114(e) of the Indian Evidence Act would be applicable and it will have to be presumed that at the interval of 15 days the accused were produced before competent Magistrate by the investigating officer. Since the human memory is apt to get dulled with the passage of time, identification parade should have been held at the earliest and preferably before expiry of period of 15 days from the date of arrest of the accused.

13. In the case of SATRUGHANA ALIAS SATRUGHANA PARIDA AND OTHERS vs. STATE OF ORISSA, 1994 S.C.C. (Criminal) 1424, identification parade was held 1 1/2 long months after the occurrence in question and after expiry of the maximum permissible period of 15 days for producing the arrested accused before the court. There was no explanation for the delay. The record did not indicate that while taking the accused to and producing them before the court the identity of the accused was not revealed. The witnesses had at no earlier stage revealed any special identifying features. Under the circumstances, the Supreme Court, while setting aside the conviction and sentence, has held that exclusive reliance could not be placed on such identification. The Supreme Court has emphasised that unexplained delay in holding test identification parade adversely affects the value of evidence of identification. In the present case also, the prosecution has not given any reason for not holding identification parade promptly. In other words, the prosecution has not placed on record the reasons as to why it was not possible for it to hold identification parade with promptitude i.e. soon after arrest of the accused. Where fate of the accused persons depends solely on the identification by the witnesses who claim to have seen them almost 1 1/2 months prior to the date of identification, it is the duty of the prosecution to state why the identification parade could not be arranged immediately after arrest of the accused and without loss of time. Unless there is good reason for the delay, the value regarding evidence of identification gets adversely affected. This dilution of the evidentiary value of identification by witnesses who claim to have seen the accused at night almost 1 1/2 months back, but who did not in their statements before the police or in the first information report, reveal any special features for identification, is a matter which weighs against the prosecution. As observed earlier, the accused persons are required to be produced before the court latest within 15 days of their arrest and, therefore, it would be reasonable to infer that they were so produced. There is nothing on record to show that the prosecution had taken care to ensure that identity of the accused was not

revealed when they were taken to court and produced as required by law. Delay in holding identification parade throws a doubt on the genuineness thereof apart from the fact that it is difficult that after lapse of such a long time witnesses must be remembering the facial expression of the appellants. The benefit of such regrettable and wholly unexplained lack of promptitude in holding test identification parade, we are constrained to say, enures to the appellants. The evidence of test identification parade lacks the requisite element of reassurance to support the conviction and a reasonable doubt arises. In view of absence of any explanation by the prosecution, we are of the opinion that the learned Judge committed material error in placing reliance on the evidence of test identification parade and the same will have to be excluded from consideration.

Moment the evidence of test identification parade is excluded from consideration, Court is left with evidence of witnesses regarding identification of the accused in Court. Neither the complainant in his complaint nor witness Ambalal Shankerlal in his police statement had noticed any special identifying features of any of the accused. It is well to remember that though the complainant Amarchand Laherulal and witness Ambalal had identified the appellants as accused nos.3 & 4 in Court, their evidence was recorded after a period of more than two years. The record does not indicate that either complainant Amarchand or witness Ambalal has photographic memory. With the passage of time, their memory is bound to get dulled. The one area of criminal evidence susceptible of miscarriage of criminal justice is the error in the identification of the criminal. The witness Ambalal himself has stated in his evidence that on seeing three intruders he was scared and, therefore, he had run away from the house. Similarly, the evidence of Amarchand also shows beyond reasonable doubt that not only he was scared, but even one of the intruders had tried to frighten him by rushing towards him. His evidence in no uncertain terms reveals that he was so frightened that he could not open the shop on October 31, 1986 and had to return to native village from which he came back to village Sachin after 10 to 15 days. If this is the mental make-up of the witnesses, it is not probable that they would notice distinguishing features of the intruders. The emotional balance of the witnesses must have been disturbed distorting their powers of perception. Into the identification enter other motives such as the desire to recuite a crime, to exact vengeance upon the person believed guilty, to find a scape-goat, to support consciously or unconsciously, an identification

already made by another etc. These motives may not be necessarily stimulated originally by the accused personally. Under the circumstances, we are of the opinion that when the prosecution witnesses do not say in their testimony before court that they had noticed any special identifying features, it becomes unsafe to place implicit reliance on the evidence regarding identification of the accused in court and that too after a period of more than two years. Identification of the appellants by the concerned witnesses does not inspire confidence, as the appellants were not previously known to the witnesses. As evidence regarding test identification parade is doubtful, it does not furnish any corroboration to the evidence of witnesses regarding identification of the accused in Court. In the case of HASIB vs. STATE OF BIHAR, A.I.R. 1972 S.C.283 it is held that purpose of test identification is to test the statement of the witness made in the court, which constitutes substantive evidence, it being the safe rule that the sworn testimony of the witnesses in court as to the identity of the accused requires corroboration in the form of an earlier identification proceeding. As there is no corroboration to the identification of the appellants by the witnesses in the Court, we are of the opinion that identity of the appellants is not established by the prosecution and benefit of doubt will have to be given to the appellants. The circumstantial evidence appearing against the appellants would be of little help to the prosecution when identity of appellants is in doubt. From the prosecution evidence, it is evident that just near the house of Devilal there are rooms in row wherein Bhaiyas are staying. Amarchand in his evidence has stated that before the date of incident he had never seen three intruders. Ambalal Shankerlal has stated that before 15 days of the date of incident, a quarrel had taken place near the house of Devilal with unknown persons in respect of matter pertaining to children. In para-10 of his deposition, Devilal has admitted that he had quarrel with Kalkaprasad at about 3.00 p.m. on the date of the incident. The record indicates that original accused nos.1 & 2 i.e. Ramsumer @ Ramnivas Ramfal @ Sarjuprasad and Kalluprasad Bindeshwari are absconding and their trial is also separated by an order dated August 26,1988. It means that as on today, trial against accused nos.1 & 2 is pending. Accused nos.5 & 6 came to be acquitted because they could not be identified by any of the prosecution witnesses. Under the circumstances, even the circumstantial evidence does not show any involvement of the appellants in the crime in question. For all these, the appeals will have to be allowed.

In the result, both the appeals succeed. The judgment and order dated June 17, 1989 rendered by the learned Additional Sessions Judge, Surat, in Sessions Case no.19/87 convicting the appellants under section 302 read with section 114 of the Indian Penal Code and sentencing them to R.I. for life are hereby set aside and quashed. The appellants are acquitted of the offences mentioned in the charge. The respondent is directed to release the appellants forthwith, unless their presence is required in connection with any other case. The order regarding disposal of muddamal passed by the learned Judge is hereby confirmed, as the trial against original accused nos.1 & 2 is pending.

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